U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 05 September 2003

BALCA Case No.: 2002-INA-143
ETA Case No.: P1998-CA-09394652/ML

In the Matter of:

JWB CONSTRUCTION SERVICES,
Employer

on behalf of

JUAN GARCIA,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Luis Sabroso
Anaheim, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by a construction company for the position of construction worker. (AF 26).[2] The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File.

[1] Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

An application for Alien Employment Certification was filed on behalf of Juan Garcia ("Alien") by JWB Construction Services ("Employer") on April 1, 1996 for the position of Construction Worker. (AF 26). The job requires a sixth grade education and two years of experience in the job offered. (AF 26). Employer initially offered a rate of pay of $7.00 per hour, but later agreed to an amendment to $20.66 per hour. (AF 26). Employer is a self-employed construction contractor. (AF 5).

Employer received six applications as a result of an advertisement placed in the Los Angeles Times, and 11 applications through the state employment service referrals. (AF 46-47). Employer's recruitment report states that "all applicants were contacted and interviewed by phone and mail within the 14 day period." The details of the contact, however, state that five of the applicants responding to the advertisement did not show up for interviews, and that the sixth applicant stated he was already employed and not interested in Employer's position when he was contacted by telephone. Employer reported that 10 of the employment service referrals never contacted him and therefore were considered not interested and not available for work. One of the referrals, however, did contact Employer. Employer told the applicant to call back later because of a lack of work. Since the applicant never called back Employer considered him to be not interested and not available for work.

On March 7, 2001, the CO remanded the application to the state employment service for an investigation of whether Employer was able to provide permanent full-time employment, because Employer had moved at least three times since filing the petition and had reported that he had told one applicant they could not hire him because of "lack of work load." (AF 44). The state employment service reported that Employer possessed a contractor's license, but has never reported any employees, and speculated that Employer is a contractor, not likely to have an employer/employee relationship with those providing building services. (AF 33). The employment service also reported that

the address changes appeared to be based on family concerns, and opined that it did not appear that Employer moved the construction company to Northern California.

On April 11, 2001, the CO issued a Notice of Findings ("NOF") indicating his intent to deny the application. (AF 23). The CO stated that employment service records indicated that Employer had no employees and had declined to hire a U.S. applicant due to a lack of available work. (AF 24). These facts raised questions as to whether "a current job opening" existed, whether Employer operates "an ongoing business" and/or whether Employer is capable of providing "permanent, full-time employment to which U.S. workers can be referred." (AF 24). Additionally, the CO found that Employer engaged in insufficient recruitment efforts by failing to contact five U.S. applicants in a timely manner, and that there was insufficient evidence of positive good faith contact efforts. (AF 24). Employer was provided with the opportunity to submit evidence to rebut these findings. (AF 24).

Employer submitted a letter dated June 14, 2001, stating his Rebuttal to the CO's findings. (AF 19-20). Employer stated that he was submitting documentation of his ability to provide permanent, full-time employment which included his tax return and contractor's license. Employer also stated his willingness to obtain a business license, but reported that he was told by local jurisdictions that only a contractor's license was necessary for the type of construction projects he performs. (AF 19). Employer also detailed his efforts to contact the five U.S. applicants identified in the Notice of Findings. (AF 19-20). Employer provided copies of certified mail receipts, appointment letters, and the local employment service applicant referral notice to prove that the contacts were made within the 14 calendar days. Employer stated that he did not have any phone bills and would not be likely to be able to obtain them because the calls were made three years ago and Employer has changed phone companies three times. (AF 20).

According to Employer, U.S. applicant Chalut was contacted within fourteen calendar days and an appointment was arranged by letter on March 27, 1998. The applicant was also contacted via telephone. Mr. Chalut was disqualified for failure to

arrive for the interview and failure to contact the employer. (AF 19). U.S. applicant Rodriguez was scheduled for an interview on March 27, 1998 and did not appear. Employer also attempted to contact Mr. Rodriguez via telephone without success. (AF 19). U.S. applicant Woodworth did not appear for his scheduled interview. (AF 19). On the day before the scheduled interview, Mr. Woodworth contacted Employer and indicated that he had already secured full-time employment. (AF 19). U.S. applicant Lopez did not appear for the scheduled interview and never contacted Employer. (AF 20). Robert Burge did not appear for his scheduled interview and did not contact Employer. (AF 20).

A supplemental Notice of Findings was issued on August 21, 2001. (AF 6). The CO indicated an intention to deny the application because of the deficiencies outlined in the NOF. The CO found that there still remained questions regarding Employer's viability as a business, and documentation of a good faith effort to recruit U.S. workers. (AF 6). The CO observed that Employer had only submitted one page of an individual income tax return, and the statement that the city does not require a business license for contractors. The CO noted that the appointment letters sent to the applicants did not identify the job offer, gave a different city for the interview than the city stated in the advertisement, and required two applicants to report to interviews at times far outside working hours.

Employer responded to the supplemental Notice of Findings on September 24, 2001. (AF 4). To establish the business' viability, Employer submitted a company proposal, company statements, purchase receipts, an invoice, a copy of his California contractor's license, a statement from Employer's credit card company, company bank statements, a copy of Employer's business card, a copy of a California contractor's bond, and a copy of an Orange City business license tax certificate. (AF 4-5, 9-18). Employer also outlined his recruitment efforts for the position. (AF 4-5). Employer argued that when they applied for the job, applicants only knew that the position was for a construction worker, and not the identity of the job offer, and noted that one of the applicants had attached a copy of the advertisement to his resume. Further, Employer

explained that the company's mailing address is a private Post Office Box, whereas its physical address is in Santa Ana. Finally, in regard to interviews outside normal business hours, Employer argued that his business hours start at 6:00 am, and that as a self-employed business owner, he does not have specific times at which he maintains an office presence. (AF 5).

A Final Determination ("FD") was issued by the CO on November 29, 2001. (AF 2-3). The CO denied certification on the grounds that Employer had not submitted complete tax returns as requested. Thus, Employer failed to establish his ability to provide permanent, full-time employment. (AF 3). Furthermore, the CO found that Employer had not established that he made a good faith effort to recruit five qualified U.S. applicants. (AF 3). Specifically, the CO found that requiring "gang interviews" outside of normal business hours did not give U.S. applicants the option to set interviews at their convenience and thus, did not provide Employer the ability to "give individual job related reasons for rejection." (AF 3). Additionally, the CO found that the advertisement stated that the job was located in Orange City and sending a notice for an interview in Santa Ana would be confusing to applicants. (AF 3). As a final matter, the CO found that the notice sent to U.S. applicants was deficient because it did not identify Employer or the job. (AF 3).

The Alien and Employer requested a review of the application by letter dated December 18, 2001. (AF 1). In support of their request, the Alien and Employer stated that complete tax returns were submitted and the Employer had made good faith effort to recruit qualified applicants. (AF 1).

DISCUSSION

Permanent, Full-Time Employment and *Bona Fide* Job Opportunity

The employer bears the burden of proving that a position is permanent and full-time. 20 C.F.R. § 656.3. If the employer's evidence does not show that a position is

permanent and full-time, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (employer submitted contracts with third parties lacking essential elements to prove permanent and full-time employment). If a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full-time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989) (existence of permanent, full-time employment not shown where the CO requested evidence of the source of the employer's funds and income in the last year, and the employer failed to produce it); *see also*. *Gencorp,* 1987-INA-659 (Jan. 13, 1988) (*en banc*).. An employer also has the burden of showing that a *bona fide* job opportunity exists and is open to U.S. workers. *See Amger Corp.,* 1989-INA-545 (Oct. 15, 1987)(*en banc*); *State of California Dept. of Consumer Affairs,* 1994-INA-396 (July 18, 1995). Labor certification is properly denied where the CO questions the existence of a *bona fide* job and the employer's rebuttal only establishes the legitimate nature of the employer's business, not the *bona fide* nature of the job. *Atherton Development Engineering Corp.,* 1992-INA-422 (May 11, 1994).

In the instant case, Employer provided insufficient documentation to establish that it can offer permanent, full-time employment and that a *bona fide* job opportunity exists. Employer is a self-employed building contractor with no history of employing workers on a permanent basis. The documentation submitted by Employer, *i.e.* contractor's license, work orders, etc., clearly establish that he has done some contracting business; however, none of those documents establish that he is able to provide permanent employment for a worker. Rather, the evidence of record supports the CO's suspicion that he cannot. Specifically, during the recruitment period he turned away one applicant because of lack of work. Moreover, the CO requested income tax records for the business and was only supplied with the first page of a year 2000 joint Federal 1040 tax return form for the Employer as an individual. Assuming that the one page of the tax return supplied by Employer reflects income from his contracting business, it does not appear to show anywhere close to sufficient business income to pay a worker at $22.66 per hour. (*see* AF 198). Employer's Wells Fargo Bank account information shows only very limited cash reserves for the business. (AF 18). One of the rebuttal documents is

only a bid for work rather than a signed contract. (AF 9-10). Two of the rebuttal documents are unsigned bids from subcontractors to Employer (AF 11, 12); one of which was only for a $645 job. (AF 12). The four bills supplied show that Employer had been billed by some subcontracters, but none of the bills are for more than a few thousand dollars. (AF 13-16). Thus, the rebuttal documents -- whether considered individually or collectively – only show a small contracting business and not a volume of work that would suggest the existence of permanent, full-time employment or a *bona fide* job opportunity, and we therefore affirm the CO's denial of labor certification on this basis.

Good Faith Recruitment Efforts

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(7). The pertinent regulations do not explicitly state "good faith" requirement in regard to post-filing recruitment, yet such a requirement is implicit. *H.C. LaMarche Enterprises*, 1987-INA-607 (Oct. 27, 1988). An employer may not discourage U.S. applicants by rigid interview schedules, confusing interview places or times, failing to interview them, and requiring additional information. *Orland Truck Stop*, 1994-INA-612 (July 23, 1996). Confusion created by the employer as to where the interviews are to take place indicates a lack of good faith in the recruiting efforts. *Suniland Music Shoppes*, 1988- INA-93 (Mar. 20, 1989)(*en banc*).

The CO properly raised the issue of lack of identification of the job offer in the letters setting up interview appointments. The record shows at least some of the applicants who responded to the newspaper advertisement were each initially sent a letter – under the letterhead of Employer's attorney – thanking the applicants for applying, stating that Employer would need to review each application in detail and therefore would need up to two weeks to set up a time table for interviews, and apologizing for "the delay necessitated by the large number of applicants."[3] (AF 80, 83). Several weeks later, Employer's attorney sent appointment letters, stating that an interview had been set

[3] We observe that there were only six applicants who responded to the newspaper advertisement.

up in Santa Ana, California (whereas the advertisement stated that the job was in "Orange."). Most of the letters set up an interview appointment at 6:00 a.m. on March 27, 1998, and did not mention that the job interview was with JWB Construction Services or that it was for a construction worker position. (AF 48, 76, 99, 188, 190, 192, 194). Rather, the only identifying information was that the applicants would be seeing John Boland. One set up an interview at the more reasonable time of 10:00 am on March 31, 1998, and at least mentioned that the interview was with JWB Construction Services. (AF 186). All the letters concluded by stating "Please respond, in writing or by phone if you are to attend this interview."

Whether intentionally discouraging or not, the appointment letters were clearly not indicative of a good faith recruitment effort. Five of the six letters did not even identify the name of the company or the position for which the interviews were being set up. Since the Employer was not identified in five of the letters there is no way for the applicants to have known what job they were being interviewed for unless they happened to know that Mr. Boland was the owner of JWB Construction Services.[4] The fact that the interviews were set up for Santa Ana rather than Orange would have further confused the applicants. The letters were not under Employer's letterhead or signature but were sent out by his law firm. Five of the six letters also set up interviews at 6:00 am. Although construction companies may typically begin business operations early in the morning, the appearance is that Employer set up these very early morning interviews knowing that the applicants might have a difficult time attending at that hour. The letters exhibited no flexibility about the interview schedule and only invited applicants to call if they would

[4] We note that the original contact letters to Mr. Burge and Mr. Woodworth did indicate that Mr. Boland and JWB Construction Services were the same. Mr. Woodworth, however, was the applicant who received an appointment letter that identified JWB Construction Services.

If original contact letters were sent to the other applicants, they are not contained in the appeal file. Assuming such letters were sent, however, we nonetheless still find that Employer's failure to identify his company name in the appointment letters would have been confusing and a potential deterrent to the applicants.

be able to attend the interview at the time stated. Accordingly, we affirm the CO's finding that Employer failed to establish good faith in recruitment.[5]

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall

[5] Since we affirm the CO's findings relative to the deterrent nature of the letters, we do not reach the issue of gang interviews.

specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.